LIBRARY
SUPREME COURT, U. S.

FILED
JUL 25 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-175

BENJAMIN FEIN, ARTHUR WEISS, CHARLES MARCONI, ROBERT LIGUORI, HARRY HIRSCH, PAUL CANTOR, GERTRUDE TANENBAUM and PHILIP SHAPIRO,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD E. WALLACH
Attorney for Petitioners
253 Broadway
New York, New York 10007
212 227-0959

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

Jurisdiction 2

Questions Involved 2

The Constitutional and Statutory Provisions Involved 2

Reasons for Granting the Writ 15

Conclusion 23

Appendix A — Decision of the United States Court of Appeals for the Second Circuit A-1

Appendix B — Judgment of the Lower Court (Fein) A-3

Appendix C — Judgment of the Lower Court (Marconi) ... A-5

Appendix D — Judgment of the Lower Court (Liguori) A-7

Appendix E — Judgment of the Lower Court (Hirsch) A-9

Appendix F — Judgment of the Lower Court (Weiss) A-11

Cases Cited

Ker v. California, 374 U.S. 23 21

Pinkerton v. United States, 328 U.S. 640, 90 L.Ed. 1489, 66 S.Ct. 1180 22

U.S. v. Chavez, Cir. 9, Feb. 28, 1973, 13 Criminal Law Reporter, 2001 19

U.S. v. Figueredo, U.S.D.C.M. Fla. November 20, 1972, 12 Criminal Law Reporter, 2253 22

U.S. v. Focarelli, 340 F.S. 1033 (U.S.D.C.MD, 1972, affirmed sub nom U.S. v. Giordano, 469 F.2d 522 Cert. granted 41 U.S. Law Week 3513 19

U.S. v. Kahn, 471 F.2d 191, 197 (Cir. 7, 1972) Cert. granted, number 72-1328, May 14, 1973, reported in 13 Criminal Law Reporter, 4045 21

U.S. v. Stanley, unreported as yet, United States District Court, Northern District of Florida, Atlantic Division, Criminal number 27541, June 18, 1973 19

Other Authorities

18 U.S.C. 371 1

Section 1955 and 2 of 18 U.S.C. 1

18 U.S.C. Section 2515 3

18 U.S.C. 2516 and 2518 2

Section 225.05 of the Penal Law of the State of N.Y. .. 5

IN THE

Supreme Court of the United States

October Term, 1973

No.

BENJAMIN FEIN, ARTHUR WEISS, CHARLES MARCONI, ROBERT LIGUORI, HARRY HIRSCH, PAUL CANTOR, GERTRUDE TANENBAUM and PHILIP SHAPIRO,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Benjamin Fein, Arthur Weiss, Charles Marconi, Robert Liguori, Harry Hirsch, Paul Cantor, Gertrude Tanenbaum and Philip Shapiro, pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals, for the Second Circuit, decided and entered June 26, 1973, affirming the judgment of conviction rendered against the petitioners in the United States District Court for the Southern District of New York on January 9, 1973. The said petitioners, Benjamin Fein, Arthur Weiss, Charles Marconi, Robert Liguori, Harry Hirsch, Paul Cantor, Gertrude Tanenbaum and Philip Shapiro, were convicted of conspiracy to violate 18 U.S.C. 1955 and 2 (prohibition of illegal gambling businesses) in violation of 18 U.S.C. 371. The order appealed from of the United States Court of Appeals, Second Circuit, is reprinted herein, in Appendix A. There is no written opinion of the Court.

Jurisdiction

The judgment and order of the United States Court of Appeals is dated June 26, 1973. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257(3) and Rule 22(2) of the Rules of the Supreme Court of the United States.

Questions Involved

A. Did the government obtain the two wire tap warrants involved in this case, to procure evidence in this case, in conformity to 18 U.S.C. 2516 and 2518?

B. Could the government have used less drastic means of investigation other than resorting to electronic surveillance — wire tapping?

C. Since all the defendants were joined both in the conspiracy and the substantive count, did Sections 1955 and 2 of 18 U.S.C. supplant the conspiracy based on 18 U.S.C. 371?

The Constitutional and Statutory Provisions Involved

AMENDMENT IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V:

". . .; due process; . . ."

". . .; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; . . ."

18 U.S.C. SECTION 2

"Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire to commit any offense against The United States . . ., and one or more of such persons do any act to effect the conspiracy each shall be fined not more than $10,000. or imprisoned not more than five years, or both."

47 U.S.C. 605:

"unauthorized publication of communications.— Except as authorized by 119, Title 18, U.S. Code, 18 U.S.C.S. Sections 2510, 2520, no person receiving, assisting in receiving, transmitting or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, . . ."

18 U.S.C. SECTION 2515

"PROHIBITION OF USE AS EVIDENCE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. SECTION 2516

"AUTHORIZATION FOR INTERCEPTIOI OF WIRE OR ORAL COMMUNICATIONS"

(1) The Attorney Generai, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with Section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of— . . ."

18 U.S.C. SECTION 2518

"PROCEDURE FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) The identity of the investigative or law enforcement officer making the application, and the officer authorizing the application; . . ."

18 U.S.C. SECTION 1955

"PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both

(b) As used in this section —

(1) 'illegal gambling business' means a gambling business which —

(i) is a violation of the law of a State or political subdivision of which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. . . ."

Section 225.05 of the Penal Law
of the State of New York

"Promoting Gambling in the Second Degree

A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.

Promoting gambling in the second degree is a class A misdemeanor. L. 1965, C. 1030, Eff. Sept. 1, 1967."

STATEMENT OF THE CASE

This case had its inception, when the petitioners with others were indicted in the Southern District of New York. The indictment alleged two counts. The first count charged all the defendants with a conspiracy commencing from on or about August 1, 1971 to the date of the filing of the indictment, to

violate 18 U.S.C. 1955 and 2; the second count charged that on or about August 1, 1971 to the date of the filing of the indictment all the petitioners and the other parties joined in the indictment violated Section 1955 and 2 of 18 U.S.C.

The petitioners waived a trial by jury and consented to the Court alone, to determine the issues on a stipulated state of facts relating to the first count charging conspiracy. After the Court rendered a verdict of guilty, the second count of the indictment based on 18 U.S.C. 1955 was dismissed.

To investigate this case, the government applied for a warrant to wire tap designated telephones. Two successive wire tap warrants were obtained. The use of the first one, namely the wire tapping and surveillance conducted thereunder, led to the procuring of a second wire tap warrant.

The first warrant named as subjects, the petitioners Weiss, Marconi, Fein and Shapiro and other parties who were named as defendants. The subject telephones were listed as follows: telephone number 212-OL5-6536 located at 2840 Bronx Park East, ground floor apartment, listed under the name of Lena Haas; telephone number 212-654-3842 located at 610 Waring Avenue, apartment 5K, under the name of Moe Schneider; telephone number 914-423-0401, located at 102 Ash Street, Yonkers, second floor apartment, under the name of Roman Tacij.

The second wire tap warrant named the subjects, Arthur Weiss, Charles Marconi, Benjamin Fein and Philip Shapiro and one Larry Kessler, and unknown others; the subject instruments were listed as follows: telephone number 212-798-4894, located at 610 Waring Avenue, apartment 5K under the name of Cecelia Blatt; telephone numbers 914-776-2976 and

914-776-2991, located in apartment 7K, 277 Bronx River Road, Yonkers, New York, in the name of Michael Antman.

Counsel for Marconi and another defendant moved the District Court to suppress the evidence procured from the electronic surveillance. Counsel for the other defendants and petitioners joined in that motion. The Court ultimately denied the motion.

The first wire tap warrant was granted December 2, 1971 and was operative for fifteen (15) days. It was based upon an affidavit by Assistant United States Attorney Patrick F. Broderick. Submitted with that affidavit was a writing from the United States Department of Justice to Mr. Broderick, dated December 1, 1971. The letter was signed by Harry E. Peterson, who bore the title Acting Assistant Attorney General. The letter acknowledged a request from the United States Attorney to apply for a wire tap warrant in regard to telephone numbers 212-OL5-6536 and 212-654-3842 at the aforementioned locations hereinabove described, in regard to the aforementioned subjects. The letter stated that the request and circumstances were reviewed and that it was determined that probable cause existed and that normal investigative procedures were not likely to succeed. In concluding, the letter authorized the application "under the powers specifically delegated . . . in this proceeding by the Honorable John N. Mitchell . . ." under Section 2516 of Title 18 U.S.C.

A Department of Justice memorandum dated December 1, 1971 to Henry E. Peterson, from the Attorney General, John Mitchell, stated, in regard to this application, that Peterson was specifically designated to exercise the power under 18 U.S.C. 2516, to authorize the application.

By an affidavit dated May 1972, made by one Harold P. Shapiro, a Deputy Assistant Attorney General, it was alleged that on December 1, 1971, he called Henry E. Peterson, in San Diego, California. Peterson advised him that the Attorney General authorized the application. It was admitted in the affidavit that Peterson authorized Shapiro to sign his name to a letter to be sent by Shapiro to Broderick, to the effect that Broderick was authorized to make the application for the wire tap warrant. By affidavit of May 30, 1972 Peterson alleged that at the time of the wire tap application he was Acting Assistant Attorney General. The affidavit described how the Department of Justice processed applications for authorization to apply for wire tapping warrants. Peterson further alleged that he reviewed the file and forwarded it to the Attorney General on November 30, 1971, recommending that consent to apply for the authorization be given. It was further admitted that on December 1, 1971 when he was in San Diego, California, Shapiro called him by telephone and that he, Peterson, authorized Shapiro to sign his name to the authorization.

By affidavit sworn to May 30, 1972, John N. Mitchell alleged that on December 1, 1971 he approved a request to apply for wire tap warrants. Initialing a memorandum dated December 1, 1971, "reflecting his favorable action" on the request and that he exercised his discretion in the matter.

However, the affidavit of Assistant United States Attorney Broderick submitted to procure the wire tap warrant alleged that the Attorney General specifically designated Peterson, Acting Assistant Attorney General, to permit the application to be made to the Court below. It was admitted that there were previous applications for wire tap warrants described in an accompanying affidavit of a federal agent named William E. Zleit.

In regard to the procuring of the second wire tap warrant, that too was based on an affidavit of the Assistant United States Attorney who applied to the Court for the first warrant. The affidavit of the Assistant United States Attorney alleged that pursuant to the power conferred under Section 2516 of 18 U.S.C., the Attorney General of the United States specially designated Henry E. Peterson, Acting Assistant Attorney General, to authorize the application for the second warrant. Annexed to the affidavit of the United States Attorney in this second application was a letter from the Department of Justice dated December 28, 1971. This letter stated that the application for an authorization to apply for the warrant was reviewed and that it was found that probable cause existed to believe that the subjects were engaged or about to commit the offenses in violation of 18 U.S.C. 1955 and 371 and that the designated facilities were used by those subjects to commit the offense. The letter concluded that under the "specially" delegated power by the Attorney General under Section 2516 of 18 U.S.C., the Assistant United States Attorney could apply for a warrant under 18 U.S.C. 2518.

By affidavit verified May 30, 1972 Sol Lindenbaum alleged that he was the Executive Assistant to the Attorney General since April 11, 1971. On December 28, 1971 "he contacted" the Attorney General of the United States by telephone and orally advised him of the contents of a memorandum from the Criminal Division of the Department of Justice and of an accompanying affidavit in regard to a "wire tap" interception regarding "certain telephones" in the Bronx and Yonkers, New York. Lindenbaum admitted that the Attorney General of the United States "orally" approved and told him (Sol Lindenbaum) to initial a memorandum to Henry E. Peterson.

A memorandum dated December 28, 1971 to Peterson

from the Attorney General of the United States referred to telephone numbers 914-776-2991 and 914-776-2792. This "authorization" recited that it was based on Section 2516 of 18 U.S.C.

By another affidavit executed by Harold P. Shapiro a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice, it was alleged and described how the Department of Justice processed a request for authorization to apply to a Court for a wire tap warrant. This request was made on December 15, 1971 (second wire tap warrant). The process consisted of an attorney employed by the Department of Justice named Moore and his superior named White, examining the file and recommending favorable action. Shapiro also reviewed the file and forwarded it to the "Office of the Attorney General with a detailed recommendation that the authorization be granted." Shapiro further alleged that "following approval in the Office of Attorney General" he signed the name Henry E. Peterson, Acting Assistant Attorney General, to a letter dated December 28, 1971 sent to Patrick F. Broderick, the Assistant United States Attorney in this case who ultimately procured the wire tap warrant, authorizing him to apply for the same.

In regard to procuring the first wire tap warrant, the factual basis was supplied by William E. Zleit a Special Agent who submitted his affidavit in support of the application. Zleit alleged that "normal investigative procedures reasonably appear unlikely to succeed if tried."

Zleit then described observations made and further described the premises involved. He alleged that he was with the Federal Bureau of Investigation for three (3) years and that the last year was devoted exclusively to investigating illegal

gambling. He described how a bookmaking business used telephones for the following purposes: (a) taking bets from bettors; (b) obtaining results and scores regarding the events; (c) the laying off of bets which was explained as the placing of wagers by bookmakers with other bookmakers.

Zleit stated the four (4) confidential informants were involved in this investigation and that they furnished information to the authorities although not necessarily to Zleit personally. In other words, Zleit recited what informers told other agents who then told Zleit.

The first informant claimed that he had information from talking directly to several members of a "Benny Fein operation" in the past and as recently as November 16, 1971. The informant's hearsay was to the effect that one of the members of the operation told him that the "operation" was continuing. Fein, Weiss, Marconi and other persons were operating in the New York City area. The informant allegedly described Fein who worked in a "wire room" as a clerk in the evenings and weekends.

The agent alleged further that the "wire room" did not use a direct telephone, but that bettors called a private individual who acted as an answering service and asked that a "Mr. Green" or "Mr. Brown" call at a telephone number where the bettor could be reached. The telephone numbers were changed monthly.

The agent stated that petitioners Weiss, Marconi, Fein and others called the answering service between 11:00 A.M. and 8:00 P.M.

On October 29, 1971 the informant related that the

current number of the answering service was 914-423-0401.

The police dossiers of Weiss and Marconi were then described.

A second informer was also relied upon. He was described as contacting the FBI on a regular basis for the previous year. On November 26, 1971 the second informant stated that he spoke to Fein in the past months and as recently as the fourth week of November 1971. "Fein's operation" was then described; it was alleged that Fein settled his accounts every Tuesday after 8:00 o'clock at a restaurant known as Cozy Corners Restaurant, 67th Avenue and Queens Boulevard. The affidavit contained a description of a surveillance of Marconi. The affidavit further stated that the informant identified photographs of Fein and Marconi.

The third informant involved related information to the authorities, that he received from a member of the "Fein operation". The informant "advised" the authorities about the "Fein operation". The informant "advised" the authorities about the "Fein operation". On November 16, 1971, the informant stated that two weeks before, a member of that "operation" told him to call telephone number 914-423-0401 in order to place a bet. The informer was said to have called that number at noon. At 12:30 Marconi was alleged to have called the informant back and at that time the informant placed a bet. This informant also placed a bet in a similar way November 12, 1971 with Marconi. The agent also described the surveillance of Marconi by other agents. This informant also identified photographs of Fein, Weiss and Marconi.

A fourth informant was said to have furnished information which the agent calimed was corroborated by independent

observations. This fourth informant informed other agents who in turn told Zleit what was related to them. On November 26, 1971 the informant stated that Philip Shapiro, Fein's brother-in-law, told him that as of the fourth week of November 1971, Fein had a large bookmaking operation. Shapiro further told the informant that he and Fein in 1969 were arrested for bookmaking; that Shapiro was "laying off" bets with Fein. The informant further related that Shapiro was a bookmaker in Queens County. Lastly the informant identified Fein and Shapiro from the photographs.

Other agents told Zleit that an informant gave them information obtained from the petitioner Weiss and a party named Kessler. On November 26, 1971 the informant stated that he personally confronted Fein and was acquainted with his "operation". During the fourth week of November 1971 Weiss and another defendant Kessler told the informant they were clerks for Fein. The informant identified Fein, Kessler and Weiss from the photographs.

Surveillance of Marconi and/or Weiss were then described in the affidavit. Fein was observed meeting five or six persons on Tuesday evenings on August 17th, August 24th, October 5th and November 9th, 1971 at the Cozy Corners Restaurant. The police records of Weiss, Marconi, Fein, Shapiro and others were also set forth.

It was, however, admitted by Zleit that federal charges formerly made against Fein, Weiss, Shapiro and others in the fall of 1969, were dismissed as against Weiss and Fein on September 15, 1970.

The agent in his affidavit also stated that the four informants were afraid to give testimony. Zleit also claimed that

the normal methods of investigation were either exhausted or "too risky" to be attempted.

Zleit admitted in his affidavit that on July 29, 1969 a wire tap warrant was procured from the United States District Court, Southern District of New York, and that Shapiro was the subject, and that the apartment involved was designated 23A of Fairway Garden Apartments, Garnersville, New York; that interception continued to August 11, 1969 but was fruitless.

On August 12, 1969, another wire tap warrant was procured as to Shapiro, at premises 306 Decatur Avenue, Bronx. The wire tap was discontinued August 14, 1969 because it likewise was a failure. And yet another wire tap warrant was obtained from the District Court, Southern District of New York as to Shapiro at 8 South Broadway, Nyack, New York, 2nd and 3rd floors. Interception under this warrant was terminated September 19, 1971.

While intercepting under this warrant, telephone calls involving gambling were made to Fein, Weiss and another at a telephone located at 141 East Sidney Street, Mount Vernon. Based on this, a search warrant was procured, and upon its execution Fein, Weiss and another were arrested for promoting gambling, a violation of New York law.

It was further alleged that from July 1, 1970 to July 15, 1971 the authorities wire tapped communications in Shapiro's residence at 133-29 82nd Road, Kew Gardens, New York, under a warrant. These charges were ultimately dismissed in November 1970.

In regard to the issue of authorization, the aforementioned is hereinabove set forth:

Zleit's affidavit showed the results of the wire tapping under the previous warrant. He described calls made on December 3 and December 6, 1971 and the information gained from the wire tapping under a prior warrant. It was also alleged by the agent that while intercepting December 3rd and December 6th, 1971, in regard to telephone number 212-654-3842 the agents heard what they knew to be telephone conversations of a "gambling nature" in the background of the subject apartment, 5K at 610 Waring Avenue. Some of the intercepted conversations were then set forth verbatum.

Zleit alleged that telephone company records disclosed that Cecelia Blatt subscribed to telephone number 212-798-4894 at apartment 5K, 610 Waring Avenue, Bronx, New York.

Prior to trial the petitioners all joined in a motion to suppress the evidence. This motion was denied.

Reasons for Granting the Writ

I

Section 2516(1) of 18 U.S.C. provides in part that:

> "2516: Authorization for Interception of Wire or Oral Communications.—(1) The Attorney General, or any Assistant Attorney Generals specially designated by the Attorney General to authorize an application to a Federal judge . . . and such judge may grant in conformity to Section 2518 of this chapter an order . . . ."

Section 2518 of 18 U.S.C. in its relevant portions provides as follows:

"Procedure for Interception of Wire or Oral Communications.—(1). Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon Oath or affirmation to a judge and shall state the applicant's authority to make such application. Each application shall include the following information: (a) the identity of the investigative or law enforcement officer making the application and the officer authorizing the application; . . ."

At the time the first wire application was made, the Attorney General of the United States initialed this authorization. On May 30, 1972 the Attorney General in an affidavit stated that on December 1, 1971 he initialed an approval to make the application.

However, in regard to the second wire tap application Lindenbaum by telephone orally advised the Attorney General of the United States of a recommendation by subordinates that the Attorney General approve this authorization. This time the Attorney General "orally" approved and authorized Lindenbaum to affix the Attorney General's initials to a directive to Henry E. Peterson showing approval. Shapiro in his affidavit stated that he signed Peterson's name to such an authorization.

The first wire tap warrant of December 2, 1971 stated that "Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized by the Acting Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Henry E. Peterson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to: . . ."

The second wire tap warrant dated December 29, 1971 has the same finding, namely, that the Acting Assistant Attorney General of the Department of Justice, Henry E. Peterson, was specially designated by the Attorney General of the United States to exercise the powers conferred on the Attorney General under Section 2516 of 18 U.S.C.

It is respectfully submitted, that the Court granting the search warrants, was not informed of the reality underlying the authorization. The facts amply show, that while the United States Attorney stated that Henry E. Peterson was specially designated, to authorize the institution of the application, the facts were otherwise. In *U.S. v. Focarelli*, 340 F.S. 1033 (U.S.D.C.MD, 1972) affirmed sub nom *U.S. v. Giordano*, 469 F.2d 522 Cert. granted 41 U.S. Law Week 3513, it was stated on page 1057 of 340 F.S. that:

> "The statutory scheme therefore sets up a two-step process. First, the application for the wire tap must be authorized by the Attorney General or by an Assistant Attorney General specifically granted authority to act by the Attorney General. Second, the identity of the person who authorized the application must be made known to the judge acting on the application and ultimately through his order, to any person who was a party to a proceeding in which the contents of any intercepted communication or evidence derived therefrom are offered in evidence or otherwise disclosed in court. These two requirements are equally important in the legislative scheme. If the only important fact were that one of the persons given the power to act by section 2516(1) had in fact authorized the application, it would not have been necessary to add the additional provisions of section 2518 to require the identity of the acting official to be set forth in the application and order."
>
> "If by way of illustration it is assumed that the Attorney General himself had authorized the application to be filed,

it would obviously be a violation of the statute for the application and the order to state that not the Attorney General but a specified Assistant Attorney General had authorized the application. The issuing judge, in the case of this illustration, and those persons who subsequently read this order would be misled and would place the responsibility for the authorization of the application upon the wrong person, that it, upon the specific Assistant Attorney General named in the application and the order rather than upon the Attorney General who had, in fact authorized the application. It would not cure the difficulty in the factual framework of this illustration to establish subsequent to the issuance of the wire tap order that the application had in fact been authorized by the Attorney General himself rather than by the Assistant Attorney General named in the application and order, since the statute requires the identity of the authorizing official to be made known to the issuing judge before the order is entered by him. Thus both tests must be met and one alone will not suffice."

As was stated in the same case under *sub nom. U.S. v. Giordano, supra*, 469 F.2d 522 at page 530:

"Acceptance of the government arguments would negate much of Title III. Section 2516 could be fulfilled by anyone; the government could extend the alter ego argument apparently without limit. Section 2518(1)(a) (requiring that the judge be informed of the identity of the person authorizing the application) and Section 2518(4)(d) requiring the judge to state this information in the wire tap order could be ignored. One is proper to ask what would be left of the statutory scheme designed to protect the individual from potential government abuse — except the assurances of government officials themselves. We agree with Judge Becker, who stated in *U.S. v. Narducci*, 341 F. Supp. 1107, 1115 (E.D. Pa., 1972), that 'the necessity for strict compliance with the statute in a wire tap situation stems just as much from the precedent-setting example of condoning laxity which could lead to further laxity in years to come, with serious consequences

to personal liberties, as from concern over the rights of the accused in a given case.' "

See *U.S. v. Stanley* unreported as yet, United States District Court, Northern District of Florida, Atlantic Division, Criminal number 27541, June 18, 1973, suppression of evidence procured under a wire tapping warrant, was had because the requirements of Section 2516(1) of 18 U.S.C. were not met.

In *U.S. v. Chavez*, Cir. 9, February 28, 1973, 13 Criminal Law Reporter, 2001, the Court held that in regard to the "authorization" a division of labor existed among the officials of the Department of Justice. Due to the division of labor there was a loss of identity as to the designated official who actually authorized the institution of the wire tap application. On page 2002 of 13 Criminal Law Reporter it was stated in part that:

"For us to sanction the procedure used in this case would be to defeat the congressional scheme. As we have shown, the application, order, affidavits and memoranda submitted to the District Court in connection with the motion to suppress are contradictory. The Court would have to engage in considerable sifting and evaluating to determine which of the rather substantial cast of characters actually approved ... requests, and even then it could not be certain. It is precisely this type of 'button, whose got the button' guessing game that is characteristic of the institutional decision, that Congress intended to eliminate."

"The government's argument suffers from a second defect. Although former Attorney General Mitchell assumed responsibility after the fact of this case were we to approve this procedure there can be nothing to prevent future Attorneys General from remaining silent if a particular wire tap proved embarrassing. Cf. *U.S. v. Giordano* ... The Wilson letter and the Mitchell memorandum were carefully drawn to create the illusion of compliance with the act. Without Mitchell's affidavit, the lines of responsibility lead

to Wilson, not to Mitchell. The quality of administrative action increases when officials know that their decisions cannot escape direct scrutiny by the courts, Congress or the public. . ."

II

Furthermore, the affidavits supporting the wire tap applications were insufficient to establish that less drastic means of investigation could not be used. Section 2518(e) of 18 U.S.C. provides that a wire tap application must contain "(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . ."

In conclusory form, Zleit alleged that less drastic means were unlikely to succeed. Further allegations in his affidavit were to the effect that visual surveillance was inadequate. The agent further added that experience showed that the gathering of physical evidence not always resulted in convictions, that gamblers do not keep permanent records, and that if they did the suspects destroyed them during a search. He asserted that not only were normal methods of investigation exhausted but they were considered "too risky to attempt".

In Zleit's second affidavit in support of the second wire tap application, the above conclusions as to futility were repeated.

It is put, that the allegations were not sufficient for the Court to pass upon in regard to whether less drastic means could be availed of.

None of the suspects or subjects had a reputation for violence. And, since telephones were allegedly used as claimed by the informers, the authorities could have attempted to procure search warrants to seize these telephones thereby closing the operation. This would have been especially effective after evidence had been gathered by the first interception.

A normal method of investigation could have been employed by having the informants call and place bets and the agent or agents could have overheard this with the informant's consent.

In regard to "Benny Fein" the agent claimed that an informant spoke to Fein. Whether the informer was asked where Fein operated from, where the wire room was, is not set forth. The record never showed whether the informant ever told this to the agent or the agents who consulted him. It is not known whether the hearsay attributed to the informants in this case, was the complete conversation, or such selections from conversation or conversations that the agent selected to allege in his affidavit.

The agent's conclusion that during arrest the suspects destroy evidence is certainly not supported by facts. A concrete example is not alleged in the affidavit. Certainly a well planned entry into a wire room could prevent the destruction of evidence. There would be no need for an announcement of purpose and authority by the agent in making any entry and thus there would be a prevention of the destruction of evidence; see *Ker v. California*, 374 U.S. 23.

In *U.S. v. Kahn*, 471 F.2d 191, 197 (Cir. 7, 1972) Cert. granted, number 72-1328, May 14, 1973, reported in 13 Criminal Law Reporter, 4045, it was stated on page 197 that:

> "... the conclusionary statement in the application and affidavit that 'normal investigative methods reasonably appear to be unlikely to succeed and are too dangerous to be used' is too slender a reed upon which to rest the invasion of ... privacy."

III

Section 1955 of 18 U.S.C. supplanted the conspiracy statute, namely 18 U.S.C. 371 and hence the petitioners could not be convicted for a conspiracy to violate Section 1955.

It is submitted, that Section 1955 of 18 U.S.C. required a concert of action between a minimum of five or more persons; this would imply an agreement to so act. Therefore, the conspiracy charge under 18 U.S.C. 371 was extraneous. In *Pinkerton v. United States*, 328 U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180, it was stated on page 643, of 328 U.S. that:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States v. Katz*, 271 U.S. 354, 355, 356, 70 L. Ed. 986, 987, 988, 48 S. Ct. 513; *Gabardi v. United States*, 287 U.S. 112, 121, 122, 77 L. Ed. 206, 210, 211, 53 S. Ct. 35, 84 A.L.R. 370. ..."

In *U.S. v. Figueredo*, U.S.D.C.M. Fla. November 20, 1972, 12 Criminal Law Reporter, 2253, where it was held that no offense in violation of Section 371 making conspiracy a crime, can be committed where the principles of the conspiracy are liable under the substantive Section, 1955 of 18 U.S.C.

CONCLUSION

This Court should grant petitioners' request for a Writ of Certiorari and entertain briefs and arguments on the merits.

Submitted by

ARNOLD E. WALLACH
Member of the Bar of the
United States Supreme Court

APPENDIX A – Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of June one thousand nine hundred and seventy-three.

Present: Hon. J. Edward Lumbard; Hon. Paul R. Hays; Hon. William H. Timbers. Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Benjamin Fein, a/k/a "Cousin", Larry Kessler, a/k/a "Junior", Arthur Weiss, a/k/a Artie, Charles Marconi, a/k/a "Charlie", Melvin Hoffman, a/k/a Phil, Robert Liguori, a/k/a "Robbie", Michael Schneider, a/k/a "Moe", Shirley Schneider, Lena Hass, Dorothy Hoffer, Paul Cantor, Harry Hirsch, Sol Levine, Robert Ochs, Gertrude Tannenbaum, Morris Koenig, a/k/a "Danny", Louis Pierro, Philip Shapiro,
Defendants,

Melvin Hoffman and Charles Marconi, Arthur Weiss, Paul Cantor, Harry Hirsch, Robert Ochs, Benjamin Fein, Gertrude Tannenbaum, Phillip Shapiro, Robert Liguori, L. Kessler
Defendants-Appellants

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

s/A. Daniel Fusaro
Clerk

APPENDIX B
Judgment Of Lower Court (Fein)

Judgment No. 73,117

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

BENJAMIN FEIN a/k/a "COUSIN"

On this 9th day of January, 1973 came the attorney for the government and the defendant appeared in person and by Max Fruchtman, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a finding of guilty, has been convicted of the offense of unlawfully, wilfully and knowingly conspiring to conduct, finance, manage, supervise, direct and own a part of an illegal gambling business, to wit, bookmaking, (a) being a violation of the laws of the State of New York (b) involving five persons who conduct, finance, manage supervise, direct and own a part of said illegal gambling business and (c) being and remaining in substantially continuous operation for a period in excess of 30 days and has a gross revenue of ($2,000) in any single day. (Title 18, United States Code, Section 371.) as charged in count 1 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years pursuant to Section 3651 of Title 18, U.S. Code as amended, with provision defendant be confined in a Jail type institution for a period of sixty (60) days as provided in the aforesaid section. Execution of remainder of sentence suspended and defendant placed on Probation for a period of two (2) years to commence upon expiration of confinement, subject to the standing probation order of this Court. Defendant is fined one thousand dollars ($1,000.00) fine to be paid within 30 days.

Count 2 is dismissed on defendant's motion, no objection by the Government.

by s/

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Gagliardi

s/ John Simpston, Clerk

APPENDIX C
Judgment of Lower Court (Marconi)

Judgment No. 73,118

UNITED STATES OF AMERICA

-v-

CHARLES MARCONI a/k/a "Charlie"

On this 9th day of January, 1973, came the attorney for the government and the defendant appeared in person, and by Vincent W. Lanna by Peter Rosato.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a finding of guilty has been convicted of the offense of unlawfully, wilfully and knowingly conspiring to conduct, finance, manage, supervise, direct and own a part of an illegal gambling business, to wit, bookmaking, (a) being a violation of the laws of the State of New York (b) involving five persons who conduct, finance, manage supervise, direct and own a part of said illegal gambling business and (c) being and remaining in substantially continuous operation for a period in excess of 30 days and has a gross revenue of ($2,000) in any single day. (Title 18, United States Code, Section 371 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is sentenced to the custody of the Attorney General for imprisonment for a period of two (2) years. Execution of prison sentence is suspended and the defendant is placed on UNSUPERVISED probation for a period of two (2) years, subject to the standing probation order of this Court. The defendant is FINED $3,500.00 to be paid within 30 days.

Count 2 is dismissed on defendant's motion, no objection by the Government.

s/

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

s/ Gagliardi

s/ John Simpston, Clerk

APPENDIX D
Judgment of Lower Court (Liguori)

Judgment No. 73,119

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

ROBERT LIGUORI a/k/a "ROBBIE"

On this 9th day of January, 1973 came the attorney for the government and the defendant appeared in person and by Lawrence J. Weingard.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a finding of guilty has been convicted of the offense of unlawfully, wilfully and knowingly conspiring to conduct, finance, manage, supervise, direct and own a part of an illegal gambling business and (c) being and remaining in substantially continuous operation for a period in excess of 30 days and has a gross revenue of ($2,000) in any single day. (Title 18, United States Code, Section 371.) as charged in count 1 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years pursuant to Section 3651 of Title 18, U.S. Code as amended, with provision defendant be confined in a Jail type institution for a period of sixty (60) days as provided in the aforesaid section. Execution of remainder of sentence suspended and defendant placed on Probation for a period of two (2) years to commence upon expiration of confinement, subject to the standing probation order of this Court. Defendant is fined one thousand dollars ($1,000.00), fine to be paid within the two (2) years probation period.

Count 2 is dismissed on defendant's motion, no objection by the Government.

s/

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

APPENDIX E
Judgment of Lower Court (Hirsch)

Judgment No. 73,114

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

HARRY HIRSCH t/n HARRY CALVARY

On this 9th day of January, 1973, came the attorney for the government and the defendant appeared in person, and by Arnold Wallach, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a finding of guilty, has been convicted of the offense of unlawfully, wilfully and knowingly conspiring to conduct, finance, manage, supervise, direct and own a part of an illegal gambling business, to wit, bookmaking, (a) being a violation of the laws of the State of New York (b) involving five persons who conduct, finance, manage supervise, direct and own a part of said illegal gambling business and (c) being and remaining in substantially continuous operation for a period in excess of 30 days and has a gross revenue of ($2,000) in any single day. (Title 18, United States Code, Section 371.) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

IT IS ADJUDGED that the defendant is guilty as charged

and convicted.

IT IS ADJUDGED that the defendant is sentenced to the custody of the Attorney General for imprisonment for a period of two (2) years. Execution of prison sentence is suspended and the defendant is placed on probation for a period of two (2) years. The defendant is FINED $1,000.00 to be paid within 30 days. Count 2 is dismissed on motion of the defendant, no objection by the Government.

s/

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

s/ Gagliardi

s/ John Simpston, Clerk

APPENDIX F
Judgment of Lower Court (Weiss)

Judgment No. 73,170

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

ARTHUR WEISS

On this 23rd day of January, 1973 came the attorney for the government and the defendant appeared in person and by William Esbitt, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a finding of guilty has been convicted of the offense of unlawfully, wilfully and knowingly conspiring to conduct, finance, manage, supervise, direct and own a part of an illegal gambling business, to wit, bookmaking, (a) being a violation of the laws of the State of New York (b) involving five persons who conduct, finance, manage supervise, direct and own a part of said illegal gambling business and (c) being and remaining in substantially continuous operation for a period in excess of 30 days and has a gross revenue of $2,000 in any single day (Title 18, United States Code, Section 371) as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS pursuant to Section 3651 of Title 18, U.S.C., as amended with provision defendant be confined in JAIL for a period of SIXTY (60) Days as provided in the aforesaid section. Execution of remainder of sentence suspended and defendant placed on probation for a period of TWO (2) YEARS to commence upon expiration of confinement, subject to the standing probation order of this Court. The defendant is FINED $1,000.00 to be paid within Two (2) Years.

Count 2 is dismissed on defendant's motion, no objection by the Government.

s/

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Gagliardi

s/ John Simpston, Clerk